IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-393

DETROIT EDISON CO.,

Petitioners,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WILLIE STAMPS, et al.,

Respondents.

BRIEF OF PLAINTIFFS STAMPS, ATKINSON AND STANFIELD IN RESPONSE TO PETITION OF DETROIT EDISON CO. FOR CERTIORARI

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SUMMARY

Petitioner, Detroit Edison Company, seeks review by Writ of Certiorari of five determinations made by the Court of Appeals for the Sixth Circuit, below. Plaintiffs Stamps, Atkinson and Stanfield oppose the grant of the Writ as to four of these five determinations on the ground that none is of sufficient importance, or a departure from settled principles, such as to warrant issuance of the Writ. Plaintiffs support the Petition to seek review of the fifth determination, in order that a conflict among

the decisions of different courts of appeals may be resolved and in order that guidance may be given the federal courts in the resolution of questions important to the administration of federal employment discrimination laws. Plaintiffs having themselves petitioned this Court to issue a Writ of Certiorari to review that determination, see Questions Presented, No. 2, Petition for Certiorari in Stamps v. Detroit Edison Company, Docket No. 75-239, p. 3, we propose herein a neutral statement of the issue for review.

Plaintiffs oppose the grant of Detroit Edison Company's Petition as to the following determinations by the Court of Appeals:

1. The affirmance of the District Court's imposition of ratio hiring and promotion requirements. Questions Presented, No. 1; Petition, pp. 2-3.

2. The determination of the scope of the affected class, insofar as incumbent black employees are involved. Questions Presented, No. 2; Petition, p. 3.

3. The inclusion of individuals who have not filed EEOC charges (some or all of whose Title VII claims may now be time-barred, therefore) within the class of those who will benefit from

Plaintiffs' prosecution of this action in District Court.[1] Questions Presented, No. 3; Petition, p. 3.

4. The inclusion of monetary awards in the relief granted pursuant to the Government's suit under Section 707 of the 1964 Act, as amended. Questions Presented, No. 5; Petition, p. 3.

Plaintiffs support the Petition's prayer for review of the Court of Appeals' determination as to the showing required of each individual class member who seeks to participate in the Decree's back pay award. Questions Presented, No. 4; Petition, p. 3. Plaintiffs suggest, however, a neutral statement of the issue for review, embracing both Detroit Edison's view of the challengable aspects of the determination below and Plaintiffs' own, see Petition for Certiorari in Docket No. 75-239, pp. 3, 12-16. It is:

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1. Plaintiffs have themselves, of course, filed timely EEOC charges raising all of the issues which Detroit Edison appears to assert that other members of the class ought also to have raised before the EEOC.

After findings of employment discrimination in violation of federal laws have properly been made, and the classes adversely affected by it properly identified, what showing should be required, in the light of those findings, of individual members of such classes to establish prima facie the entitlement of each to back pay and what showing may the defendant then make to rebut such prima facie entitlement?

ARGUMENT

I.

THE DETERMINATIONS BELOW, AS TO FOUR OF THE ISSUES UPON WHICH PETITIONER SEEKS REVIEW, ADHERE TO WELL-SETTLED PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW WHICH DO NOT WARRANT REVIEW BY THIS COURT, OR FAIL TO RISE TO THE IMPORTANCE REQUIRED FOR ISSUANCE OF THE WRIT.

A. The Imposition of Temporary Remedial Quotas. In opposing the remedial quotas affirmed below, the Detroit Edison Petition (pp. 9-14) inveighs eloquently against the evils of race discrimination with a fervor characteristic of the recent convert. The evils are, of course, real. What the Petition ignores is that race discrimination here has already occurred, detailed in the District Court's extensive findings of fact which are, in turn, well-grounded in the record. The victims of that discrimination are among the members of the classes herein defined. No remedy can restore these victims to the "rightful place," see Loc. 189, U.P.P. v. United

States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970), which such discrimination has denied each of them by measures which do not distinguish between that discrimination's victims (who are black) and its beneficiaries (who are white).

Thus, the simplest case of individual discrimination may require as a remedy that the white beneficiary who was wrongfully awarded the job be displaced, see, e.g., Ringer v. Mumford, 355 F. Supp. 749 (D.D.C. 1972), or that the black victim be awarded the next opening, see, e.g., Asbestos Workers Loc. No. 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969). In either event, for the limited and temporary purpose of remedying the proven act of discrimination, a white may be denied a job because he is white or a black may be granted one because he is black.

Where the discrimination has had a class impact, cases from nearly every Circuit have found it frequently necessary to provide relief, comparable to such "next-job-opening" awards in individual cases, by ordering hiring (or promotion) ratios of quotas. United States v. Wood Lathers Loc. No. 46, 471 F.2d 478 (2nd Cir. 1973), cert. denied, 412 U.S. 939 (1973); Asbestos Workers Loc. No. 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. IBEW Loc. No. 38, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970); United States v. Carpenters Loc. No. 169, 457 F.2d 210 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972); United

States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Ironworkers Loc. No. 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).[2] Cf. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1971); Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973) (en banc). And see Oburn v. Shapp, ____ F.2d ____, 11 FEP Cases 58, 63, (3rd Cir., Aug. 6, 1975). The one case relied upon by Petitioners, Kirkland v. Department of Correctional Services, ____ F.2d ____, 11 FEP Cases 38, (2nd Cir. Aug. 6, 1975), merely reversed a remedial quota order for insufficient proof of "a clear-cut pattern of long-continued and egregious racial discrimination" coupled with substantial evidence "of identifiable reverse discrimination", without undercutting the authority of that Court's prior decisions sustaining such remedies in circumstances more closely resembling those of the present case. See also Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

Such ratio hiring orders differ principally from a "next-job-opening" award in an individual case in that they preserve a portion of the first job openings for whites who, while

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2. A more comprehensive listing of the decisions ordering quota remedies appears in NAACP v. Allen, 493 F.2d 614, 620, notes 7 & 9 (5th Cir. 1974). See also Slate, "Preferential Relief in Employment Discrimination Cases," 5 Loyola U. L. Rev. 315, 318-320, notes 8-10 (1974).

they may have been among the beneficiaries of the discrimination found, were not the perpetrators of it. Thus, a need to preserve their job incentives is recognized in the terms of the Decree.

While the rationale for race-conscious methods of undoing unlawful discrimination has been variously articulated, see especially Morrow v. Crisler, 491 F.2d, 1053, 1057-64 (5th Cir. 1974) (concurring and dissenting opinions), sometimes perhaps less than satisfactorily, doubts as to the propriety of this, by now well-established, remedy in some of the divergent circumstances in which it has been ordered will hardly warrant reconsideration of the award in this case. Here the effect of the award is to put probable and, sometimes, identified victims of the Defendants' proven discrimination, into their "rightful place" as expeditiously as may be done while reserving some openings for whites. Moreover, the discrimination here found has been far from inadvertent, but deliberate and egregious, involving Defendants who have resisted the mandate of equal opportunity with intransigence. If any court were warranted in choosing a ratio remedy as "the only rational, non-arbitrary means of eradicating past evils", NAACP v. Allen, Note 2 supra, 493 F.2d at 619, in preference to sole reliance on more generalized orders that may be more

generalized orders that may be more easily evaded, the District Court in this case was.[3]

Edison complains of the specific goals and quotas imposed, as well. Its quarrel with the District Court's goal of 30% blacks within Edison's total work force (25% in "high opportunity jobs"), however, relies upon a narrow and distorting statement of the bases for the District Court's selection of that figure. See District Court Order, Para. 9, Note 4; Petition, Appendix B, p. 70a. The balancing of many factors was warranted in the selection of the District Court's goal: not only the black proportion of the population of the City of Detroit,[4] where 50% of Edison's workforce is concentrated, but

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3. In fact, the experience private Plaintiffs have had with implementation of those parts of the present Decree that were not stayed pending appeal, has been that only the quota remedies in the Decree tend to work smoothly and obviate evasive tactics.

4. 44% by 1970 Census count, 47% after correction for the Census Bureau's estimate of a 7.7% undercount of blacks (Bureau of Census, "Estimates of Coverage of the Population by Sex, Race and Age in the 1970 Census", Paper Presented at the Annual Meeting of the Population Association of America, New Orleans, Apr. 26, 1973) and still more after allowance for concinued in-migration to such date as the District Court's goal may be expected to be achieved.

also the larger number of skilled blacks who are unemployed, the additional numbers of blacks living elsewhere in the area from which Edison's workforce is drawn, as well as the omission from the Decree's quota provisions of Edison's professional and managerial positions where, because of educational and experience disadvantages, blacks may be expected to continue to be underrepresented when compared to population.5

Similarly, Edison's complaint that the specific ratios ordered exceed the goals (thus, 60% black promotions into high opportunity jobs until a 25% goal is achieved) seeks to relegate the remedying of its violations into a future generation and to award the relief to

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5. The narrowness of Edison's quarrel with the goal is illustrated by its complaint that population parity for that portion of its workforce which is employed within the City of Detroit (50%) should be diluted by the proportion of its city job-holders who may be expected to live in the suburbs and commute to the city. Petition, p. 7. Edison's racial attitudes seem to have blinded it to the aspirations of at least an equal proportion of city residents who may seek to commute to jobs which Edison affords outside the city, the other 50% of its available positions.

which its victims are entitled only to their children and grandchildren.[6]

The District Court's affirmative action requirements, including goals and quotas, were affirmed by the Court of Appeals on bases amply warranted in the record and in decisional law. The quotas are limited by the Order's terms to be "subject to the availability of qualified applicants," District Court Order, Paras. 9, 11, Petition, Appendix B, pp. 70a, 71a. The District Court retains jurisdiction of the action for purposes of modifying its Decree, and may be expected to do so upon the showing of any unanticipated development affecting the statistical assumptions undergirding its Order. No part of the remedial quota Order complained of warrants review by Certiorari at this stage.

B. Scope of the Affected Class. The Petition's next complaint about the Court of Appeals' Judgment, that it appears to benefit all black Edison employees, is one that can have no effect beyond the confines of this case.

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6. A 60% ratio-hiring requirement, applied to a supervisory force of 1111 that was 1.1% black in 1972, see District Finding No. 16; Petition, Appendix B, p. 24a, will achieve its 25% goal in six years, assuming a 10% annual turnover rate. Were the ratio-hiring requirement to be 26%, the black proportion of supervisors fifteen years after the Decree would be only 20%, on the same assumption.

One of the grounds relied upon by the Court of Appeals for its narrowing at Edison's urging, of the District Court's definition of the "affected class" was a pre-trial Order referring to the class represented by Plaintiffs as "all black Edison Employees." Petition, Appendix C, pp. 87a-88a. Subsequently, the Court of Appeals referred to this group as the class "eligible to be considered for back-pay awards." Petition, Appendix C, p. 97a. If the latter was a mere inadvertent "broaden/ing/. . . of the affected class", Petition, p. 16, on the part of the Court, it surely would have been altered on a petition for rehearing.[7]

If it was an erroneous determination, its greatest effect will be to permit black employees to bid for jobs for which they are qualified and to seek back pay by making the showings (again, including those pertaining to qualifications) required of candidates seeking entitlement to participate in the back-pay award. The present denial to a black employee of an opportunity to transfer to a job for which he is qualified presumptively would violate Title

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7. However, it is not true, as asserted in the Petition, that the District Court found "that certain (but only certain) employees were 'locked in' to so-called 'low opportunity' jobs." Petition, p. 8. See District Court's Summary of Findings (Petition, p. 13a), Findings Nos. 11 (p. 22a), 46-50 (pp. 37a-40a), and Conclusion No. 8 (p. 58a).

VII, and the past denial of such an opportunity would appear to be a violation warranting a back-pay award. At most, then, Edison is complaining of procedural consequences (including those affecting burden of proof) through which it could hope to insulate itself from, or postpone, responsibility for Title VII compliance. These matters could appropriately be addressed to the District Court on remand.

C. Inclusion of Individuals Who Did Not File EEOC Charges in Benefits of the Decree. For the first time in this Petition Detroit Edison Company suggests that the District Court's inclusion within the scope of the affected class of some former Edison employees who failed to file EEOC charges may have been erroneous. At the same time, it suggests that this reasoning may be equally applicable to present employees. Petition, p. 17, fn.

If Edison is making the latter, broader contention, it would seem to be asking this Court to reject, or at least qualify, the position which it adopted as recently as Albemarle Paper Company v. Moody, ____ U.S. ____, 95 S.Ct. 2362 (June 25, 1975), that individual members of a Rule 23 class need not have filed EEOC charges

themselves in order to participate in a Decree's back-pay award.[8] The narrower contention hardly warrants review by Certiorari, if it was not pressed below. (See, also, United States v. Georgia Power Co., 474 F.2d 906, 922-25 (5th Cir. 1973), relied upon by the Court of Appeals, at Edison's urging, to limit participation in the back-pay award by application of the Michigan three-year statute of limitations.)

D. Monetary Awards in Actions Brought by the Government under Section 707 of Title VII. Finally, Edison would ask this Court to review the Government's position, earlier thought to have been settled in United States v. Georgia Power Co., supra, 474 F.2d at 919-921, that back-pay awards are among the relief obtainable in actions brought by it under Section 707. The statutory predicate for Edison's contention is the omission of explicit reference to "back pay" from Section 707(a)'s authorization of the Attorney General (now the EEOC, see Section 707(c), 42 U.S.C. § 2000e-6(c)) to sue "requesting such

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8. The settled state of the decisional law among the federal courts of appeals, on this issue, and the congressional ratification of it in the course of adoption of the 1972 amendments, is thoroughly summarized in Footnote 8 of the opinion in Albemarle Paper Co., 95 S.Ct. at 2370.

relief, including /injunction, &c./,9 as he deems necessary to insure the full enjoyment of the rights herein described." 42 U.S.C. § 2000e-6(a). "Back pay" is mentioned in the remedy-authorizing provision for the private suit, Section 706(g). 42 U.S.C. § 2000e-5(g).

The importance of back pay, as part of an overall system of remedies "to insure the full enjoyment of the rights herein described" was recently elaborated upon in this Court's opinion in Albemarle Paper Co. v. Moody, supra, 95 S.Ct. at 2371-72. Given that importance, it is unlikely that a congressional purpose to bar back pay would be read into a mere failure to mention it in a listing of examples which appears merely to be intended to amplify a general grant of authority to seek "such relief . . . as he deems necessary to insure the full enjoyment of" such rights. In support of its contention, Edison can marshall but one District Court opinion, United States v. United Association of Journeymen, Loc. No. 24, 364 F. Supp. 808 (D.N.J. 1973), which cites several reasons for declining to

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9. The statutory language omitted at this point in text reads: "an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice,"

award back pay in the circumstances before it, only one of which is that the Court did "not find /the/ rationale /of United States v. Georgia Power Co., supra/ compelling." 364 F. Supp. at 832. The issue is hardly one as to which sufficient doubt, or conflict, exists to warrant the grant of Certiorari.

II.

THE COURT OF APPEALS' DETERMINATION AS TO THE SHOWING REQUIRED OF INDIVIDUAL CLASS MEMBERS IN ORDER TO PARTICIPATE IN THE BACK PAY AWARD MISAPPLIES INAPPOSITE DECISIONS OF THIS COURT, CONFLICTS WITH THOSE OF OTHER COURTS OF APPEALS, AND DEFEATS THE REMEDIAL OBJECTIVES OF FEDERAL EMPLOYMENT DISCRIMINATION LAWS.

Plaintiffs support the Petition's prayer for review of the determination below that individual members of the victim class must prove their entitlement to participate in the back pay award by showing: (1) that each "indicated a desire to transfer to a vacant job, but did not do so because it would have been futile under existing company practices", and (2) that "the position was filled by someone possessing the qualifications of the applicant or someone less qualified." Order of the Court of Appeals of May 16, 1975; Petition, Appendix D, p. 106a.

However the issue on Certiorari may be framed (see discussion in our Summary, supra), both Plaintiffs and Petitioners

believe that this determination misapplies this Court's direction as to burden of proof in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972) (amplified in Albemarle Paper Co. v. Moody, ___ U.S. ___, 95 S.Ct. 2362, 2375 (June 25, 1975)).

After Plaintiffs' filed their Petition for Certiorari in Stamps v. Detroit Edison Company, Docket No. 75-239, seeking review of this same determination, additional decisions of the courts of appeals of other circuits have been reported, emphasizing the conflict which both parties urge warrants resolution by this Court: Hairston v. McLean Trucking Co., ___ F.2d ___, 11 FEP Cases 91, 95, 10 EPD Par. 10,353, p. 5464 (4th Cir. Aug. 6, 1975) ("If an employer can avoid back pay liability through a policy which makes an attempt to gain a better job risky or futile, then this subtle form of discrimination is encouraged, not discouraged." District Court judgment reversed for confining back pay award to those who requested transfer); Sabala v. Western Gillette, Inc., ___ F.2d ___, 11 FEP Cases 98, 109, 10 EPD Par. 10,360, p. 5504 (5th Cir. Aug. 4, 1975) (where employer filled vacancies in better jobs from "casuals" without entertaining applications from incumbents who might seek transfer, District Court did not err in awarding back pay without regard to whether individuals "actually made inquiries"); cf. United States v. T.I.M.E.-D.C., Inc., ___ F.2d ___, 11 FEP Cases 66, 81, 10 EPD Par. 10,361, pp. 5518-19 (5th Cir., Aug. 8, 1975)

(carry-over seniority upon transfer to better positions to be computed from date of original hire; alternatives such as date of application for transfer or of filing EEOC charge rejected).

The determination below seems actually to require the individual incumbent or former employee to show four facts: (1) that a particular vacancy opened at a time when he might have filled it, (2) that he possessed the (legitimate, non-discriminatory) qualifications for appointment to it, (3) that he signalled his desire for it at that time, and (4) that the person ultimately appointed was not better qualified. The burden of making the first and third showings is unreasonably difficult for the claimant in the face of the facts found in this case: (1) that the Defendants' system for promotions often deprived individual blacks of knowledge even that particular vacancies existed, District Court Findings Nos. 46-50; Petition, Appendix B, pp. 37a-40a, and (2) that it rendered futile, as to many class members, any aspiration for transfer to such positions, District Court Findings Nos. 5, 15, 46-50, Conclusion No. 8; Petition, Appendix B, pp. 19a, 24a, 37a-40a, 58a. In fact, we submit, the requirement of the third showing, in the face of the system then in operation,

serves no useful purpose at all in ascertaining which back pay claims are bona fide.[10]

Only the second showing, that the claimant possessed the requisite, job-related qualifications, is legitimately imposed on the claimant at this stage of the proceedings, we believe. The first and the fourth matters -- the timing of openings and the superior qualifications, if any, of those actually appointed to them -- relate to facts as to which the Defendants have superior access and as to which, violation of the law victimizing the members of this class[11] having already been established, the burden of proof is fairly allocable to Defendants.

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10. This does not mean, of course, that the Defendant should not be privileged to show that an individual claimant would have been disinterested in promotion at the relevant time for reasons independent of Defendants' discriminatory system.

11. Only the identification of which individual class members were the victims remains to be established.

Because the determination below imposes burdens upon potentially genuine victims of proven violations which they will be unable to carry for reasons occasioned by the manner of those violations, it will tend to insulate systems of discrimination of the kind here established from all but prospective remedy. If allowed to stand, it will unwarrantedly defeat the significant Congressional objective that seeks to "make whole" the victims of prohibited discrimination. See Albemarle Paper Co. v. Moody, ____ U.S. ____, ____, 95 S.Ct. 2362, 2372 (June 25, 1975).

CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted to review the Court of Appeals' determination as to the showing required of individual back pay claimants, and denied as to the remaining issues sought to be reviewed.

Respectfully submitted,

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